CHANCERY COURT OF THE CITY OF RICHMOND.

W. B. W. BROOKING v. G. RUDOLPH NOLDE AND OTHERS.*

AGENCY — *Marginal release of trust deed under sec. 2498, Va. Code 1904.* — A broker, who negotiated a loan secured by deed of trust and who received payment in full of the note evidencing the same but paid only part to his principal, and who was not in possession of the note secured, is not such an agent as can bind his principal by a marginal release under sec. 2498, Va. Code 1904, and such release can not affect the lien of the creditor whose money he loaned.

The petition for appeal, given in full below, states the case.

A. K. and *D. H. Leake,* for the complainant.

John Garland Pollard, for the defendants.

No written opinion was filed.

To the Honorable Judges of the Supreme Court of Appeals of Virginia.

Your petitioners, G. Rudolph Nolde, John S. Montgomery, and Roy C. Montgomery, respectfully represent they are aggrieved by a decree of the Chancery Court of the City of Richmond entered on March 15, 1905, in a chancery cause wherein W. B. W. Brooking, surviving partner, was complainant and your petitioners and others were defendants. By inspection of the record, a transcript of which is herewith presented, the following facts will appear:

STATEMENT OF FACTS.

On February 25, 1898, Brooking & Kean, the firm of which the complainant is the surviving partner, loaned to one Oscar E. Parrish through Samuel H. Pulliam, real estate agent and broker, the principal sum of eight hundred dollars ($800.00), evidenced by a negotiable note for that amount signed by the said Parrish and made payable to his own order, and secured by a deed of trust on certain real estate in the City of Richmond. Subsequently Parrish conveyed the property to Fleming L. Landrum, who in turn conveyed the same to your petitioners, John S. and Roy C. Montgomery, who in turn conveyed the same to your petitioner, G. Rudolph Nolde, the present owner. About one year before the conveyance of the same to John S. and Roy C. Montgomery the said deed of

*Reported by C. B. Garnett.

trust had been marked fully satisfied on the margin of the deed book wherein the same was recorded, so that when said property was purchased by your petitioners, the said John S. and Roy C. Montgomery, and subsequently in turn by your petitioner, G. Rudolph Nolde, the record in the clerk's office showed that the said property was free from the lien of the said deed of trust. The said marginal release was made in pursuance to section 2498 of the Code of Virginia and was signed by Samuel H. Pulliam as beneficiary, when in fact the said Pulliam was not the beneficiary, but was only the broker through whom said loan had been negotiated and through whom payments had been made on account of said note. The marginal release was in the following words: "I certify that the notes secured by this deed of trust were presented to the clerk marked paid. Teste, J. T. Poindexter, D. C. This deed of trust has been fully satisfied. Attest, Samuel H. Pulliam, beneficiary. J. T. Poindexter, July 17, 1901."

The said Landrum purchased the property subject to the deed of trust and requested permission of Pulliam to pay the same off at the rate of $50 every three months. This request was communicated to the complainant, who made no objection to the payment of the note in such instalments. It appears from the endorsement on the back of the note made in the handwriting of the complainant that Pulliam did in fact collect the first two instalments of $50 each, which payments the said Pulliam turned over to the complainant, one on June 12, 1900, and the next on October 15, 1900. Landrum subsequently paid the whole amount of the note to the said Pulliam, who failed to account to the complainant, but in July, 1901, caused to be made the marginal release referred to. The complainant admits that the $800 originally loaned was handed by him to Pulliam, who negotiated the loan and who was the broker through whom the complainant had frequently negotiated other loans. He further admits that although the note fell due February 25, 1900, and though he received no payment either in principal or interest after October 15, 1900, yet he did not begin his investigations into the matter until nearly three years afterwards, to wit, in July, 1903, when this suit was brought. The testimony further shows that he never applied to the maker of the note for payment of same, but that all of his applications for payment were to the said Pulliam and all of his collections on said note were through him.

On the other hand, the evdence of your petitioners, the defendants, showed that they employed competent title examiners to examine the title to the property, and that at the time of their respective purchases the record disclosed no lien against the property. It was also shown that none of the petitioners had any dealings with or through the said Pulliam as to the property in question.

Upon this state of facts the Chancery Court of the City of Richmond entered its decree declaring said property to be subject to the lien of the said deed of trust and ordered that unless the said note should be paid within ten (10) days from the date of the decree special commissioners named therein should sell the said property to satisfy said deed of trust.

THE LAW OF THE CASE.

This case is identical in principle with the case of *Evans Bros.* v. *Roanoke Savings Bank,* decided by this court in 1897 and reported in 95 Va. 294, and it was according to the principles therein laid down that the lower court should have been governed in the decision complained of. In that case the facts were quite complicated, involving a number of conveyances affecting different pieces of property, but the facts, so far as they bear upon the case in hand, may be stated in brief as follows: Read, the owner of a lot of land in the City of Roanoke, gave a deed of trust on the same to secure Meyers the payment of certain notes which Meyers subsequently sold to the Roanoke Savings Bank. After Meyers had parted with the notes he fraudulently had the deed of trust securing him marked satisfied under section 2498 of the Code. The Covenant B. & L. Association relying on the validity of the release subsequently loaned the owner the sum of $400, taking the deed of trust therefor. The main question decided in the case was that although the notes held by the bank were secured by a prior deed of trust and which deed was fraudulently marked satisfied, yet the note held by the Covenant B. & L. Association was entitled to priority. This court in its decision seems to have been governed by the conviction that it is more important to preserve the integrity of the records as evidence of title than the negotiability of liens in the interest of the holders of negotiable paper. "The object of the registry acts is to enable any person about to deal with reference to any parcel of land to discover, or find the means of discovering, every existing and outstanding estate, title, interest in, or encumbrance upon the lands which could affect

the rights of the *bona fide* purchaser." 2 Pom. Eq. Jur. sec. 649. This court, in the case referred to, quoted with approval the language of *Chew* v. *Barnet,* 11 Serg. & R. 389, and of *Briscoe* v. *Ashby,* 24 Gratt. 454, in which it was said, "the purchaser of a legal title takes it (the land), discharged of every trust or equity which does not appear on the face of the conveyance, and of which he has not had notice either actual or constructive."

This court in *Snyder* v. *Granstaff,* 96 Va. 473-477, adopting the language of the antecedent cases, said: "It can not be questioned at this day that the purchaser for value without notice, actual or constructive, will not be affected by a latent equity, whether by a lien, encumbrance, trust, or fraud, or any other claim."

In the case of *Evans Bros.* v. *Roanoke Savings Bank, supra,* the court based its decision mainly upon the case of *Williams* v. *Jackson,* 107 U. S. 478. In that case Sweet purchased and took a deed of conveyance from Davis for a house and lot in Washington and executed a trust deed securing four notes for the deferred payments, the notes being made payable to Davis. Before maturity these notes were endorsed for value to Jackson & Co. After the first note had been paid and before the others became payable Davis and the trustee executed a release, reciting that the notes secured by the trust deed had been fully paid, when in fact three of them were unpaid in the hands of Jackson & Co. Relying upon this release Williams lent Sweet $5,000 and took a trust deed on the property to secure payment. Jackson brought his bill against Williams, Sweet, Davis, and others, praying that the release be declared void and that the trust deed securing him be declared to have priority over that securing Williams. The court below decreed that the proceeds of the sale of said property should be applied first to the payment of the notes held by Jackson & Co., but the Supreme Court of the United States reversed the decree and held that Williams was entitled to priority, remarking, "that to charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or wilful negligence on his part, would be inconsistent with the purposes of the registry laws, and with settled principles of equity and the convenient transaction of business. The equity of Williams being at least equal with the plaintiff, the legal title held for Williams must prevail, and he is entitled to priority." See also *Bank* v. *Harman,* 75 Va. 604.

At the time that the case of *Evans Bros.* v. *Roanoke Savings Bank* arose section 2498 provided that the marginal release should "operate as a release of the encumbrance as to which such payment or satisfaction is entered." Afterwards the General Assembly, to strengthen if possible the effect of marginal releases, amended the section so as to read that such a release should operate "as *fully* and *effectually* as if the said marginal entry were a formal deed of release duly executed and recorded;" and this was the law governing the case in hand. The enquiry therefore arises, what would have been the effect of a deed of release in this case? There can be no question that it would have conveyed the legal title in the property to Landrum and that his title would have in turn been conveyed to your petitioners. The legal title is therefore to-day in Nolde, the present owner. "Unless one who seeks the aid of equity can establish an equity superior to that of the holder of the legal title to the subject matter he fails to overcome the legal right. which consequently prevails against him" (16 Cyc. 138), which is but another way of saying that where equities are equal the law will prevail.

In the statement of the law above we have proceeded on the assumption that the complainant and your petitioners were equally innocent in this transaction. Whatever view the court may take as to the applicability of the authorities above cited, the court below should have refused the relief prayed for in the bill, because it was the complainant who put it in the power of Pulliam to perpetrate the fraud. The record shows that Pulliam was the agent of the complainant in making the loan, that the cash actually passed through his hands, and that Pulliam secured from the complainant the right to allow the said note to be paid in instalments, and that he (Pulliam) did in fact collect and turn over to the complainant two payments on the same, as is evidenced by the complainant's admission in his testimony and by the endorsement on the back of the said note made in the complainant's handwriting. It does not appear that the complainant ever denied that Pulliam was his agent until the filing of the bill in this case. The complainant, by entrusting to Pulliam the collection of the note, put it in his power to perpetrate the fraud, and your petitioners should not be made to suffer because the man whom the complainant trusted with the collection of the money failed to turn over the same to his principal. It is true that the complainant in his testimony vigorously denies

that Pulliam was ever his agent, but the facts admitted by him make the conclusion inevitable that Pulliam was in law the complainant's agent. There was no reason at that time why the complainant should not have trusted in Pulliam, because as he testifies he had every confidence in Pulliam and had frequently negotiated loans through him. On page twenty-six of the transcript it will be seen that complainant in answer to cross-questions 9 to 12, inclusive, is unwilling to say that he did not authorize Pulliam to collect the money. In fact, he admits that he never applied to the payee of the note, but that all of his applications for payment were through Pulliam.

On the other hand, your petitioners are entirely innocent in the transaction. Before accepting the property they had the title examined by competent title examiners, who reported the same clear. The record showed that the deed of trust was released according to law. They relied, as they had a right to do, on the certificate of the clerk that the note had been produced before him marked "paid." They relied on the assurance of the statute, to wit, that the marginal release should operate "as *fully* and *effectually*" as a *formal deed* of *release duly executed* and *recorded.* Furthermore, they had no transaction with Pulliam and in no way contributed to his ability to perpetrate the fraud.

In view of the foregoing, your petitioners insist that the court below erred, both in overruling your petitioners' demurrer, and in deciding upon the merits that the property in question was subject to the lien and should be sold to satisfy the same.

NOTE.—The petition for the appeal was refused by the Supreme Court of Appeals of Virginia, June term, 1905, Wytheville, Va.

See editorial on marginal releases in this issue.